

IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

DCA NO. 3D09-3209

FILED
THOMAS D. HALL
2010 JAN 22 A 10:35
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RODRIGO BONILLA,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON JURISDICTION

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

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INTRODUCTION

Petitioner, Rodrigo Bonilla, seeks discretionary review of a decision of the Third District Court of Appeal that is certified to be in direct conflict with the First District Court of Appeal's decision in *Montgomery v. State*, 34 Fla. L. Weekly D360 (Fla. 1st DCA Feb. 12, 2009), *review granted*, 11 So. 3d 943 (Fla. 2009) (Fla. S. Ct. No. SC09-332), which is currently pending in this Court. The symbol "A" refers to the opinion of the lower court, as set forth in the Appendix to this brief.

STATEMENT OF THE CASE AND FACTS

Petitioner, Rodrigo Bonilla, filed a petition for writ of habeas corpus arguing that appellate counsel was ineffective for failing to argue, in this "pipe-line" case, that the trial court fundamentally erred by giving the standard jury instruction on manslaughter by act. (A. 1). The Third District Court of Appeal denied the petition for writ of habeas corpus but, to preserve Petitioner's rights, certified conflict with *Montgomery v. State*, 34 Fla. L. Weekly D360 (Fla. 1st DCA Feb. 12, 2009), which was decided while Petitioner's direct appeal was pending. (A. 1-2). *See Bonilla v. State*, 19 So. 3d 431 (Fla. 3d DCA Sept. 23 2009) (denying Petitioner's direct appeal).

SUMMARY OF ARGUMENT

The Third District's decision cited to, and certified direct conflict with, the First District Court of Appeal's decision in *Montgomery v. State*, 34 Fla. L. Weekly D360 (Fla. 1st DCA Feb. 12, 2009), *review granted*, 11 So. 3d 943 (Fla. 2009) (Fla. S. Ct. No. SC09-332), which is currently pending in this Court. A citation to a decision that is pending in this Court is prima facie evidence of an express conflict of decisions. *See Jollie v. State*, 405 So. 2d 418 (Fla. 1981).

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL'S DECISION CITED TO, AND CERTIFIED DIRECT CONFLICT WITH, THE DECISION IN *Montgomery v. State*, 34 Fla. L. Weekly D360 (Fla. 1st DCA Feb. 12, 2009), WHICH IS CURRENTLY PENDING IN THIS COURT (*State v. Montgomery*, SC09-332) ON THE ISSUE OF WHETHER IT IS FUNDAMENTAL ERROR TO GIVE THE CURRENT STANDARD JURY INSTRUCTION FOR MANSLAUGHTER BY ACT.

Petitioner, Rodrigo Bonilla, filed a petition for writ of habeas corpus arguing that his appellate counsel was ineffective for failing to argue on direct appeal that it was fundamental error for the trial court to give the standard jury instruction for manslaughter by act. (A. 1). In denying the habeas petition, the Third District cited to, and certified direct conflict with, the First District Court of Appeal's decision in *Montgomery v. State*, 34 Fla. L. Weekly D360 (Fla. 1st DCA Feb. 12, 2009), *review granted*, 11 So. 3d 943 (Fla. 2009) (Fla. S. Ct. No. SC09-332). (A. 1-2). The *Montgomery* case is currently pending in this Court on certified direct conflict with

Barton v. State, 507 So. 2d 638(Fla. 5th DCA 1987), *rev'd on other grounds*, 536 So. 2d 1194 (Fla. 1988), and on the following certified question of great public importance:

IS THE STATE REQUIRED TO PROVE THAT THE DEFENDANT INTENDED TO KILL THE VICTIM IN ORDER TO ESTABLISH THE CRIME OF MANSLAUGHTER BY ACT?

See Montgomery v. State, 34 Fla. L. Weekly D360 (Fla. 1st DCA Feb. 12, 2009).

The First District in *Montgomery* held that the trial court fundamentally erred in giving the standard jury instruction for manslaughter by act because that instruction suggested that the State was required to prove intent to kill in order to establish the crime of manslaughter. *Id.*


The Third District rejected Petitioner's argument that appellate counsel was ineffective for failing to raise this argument on his direct appeal. However, in denying Petitioner's habeas petition, the Third District cited to, and certified direct conflict with, the *Montgomery* case. (A. 1-2). A citation to a decision that is pending in this Court is prima facie evidence of an express conflict of decisions. *See Jollie v. State*, 405 So. 2d 418 (Fla. 1981). Therefore, as it did in *Montgomery*, the Court should exercise its jurisdiction in this case to resolve this issue.

CONCLUSION

In light of the foregoing demonstration that the Third District Court of Appeal's decision is certified to be in direct conflict with the decision of another district court of appeal, Mr. Bonilla respectfully requests that this Court exercise its jurisdiction under Article V, Section 3(b)(4), Florida Constitution, to resolve this conflict.


Respectfully submitted,

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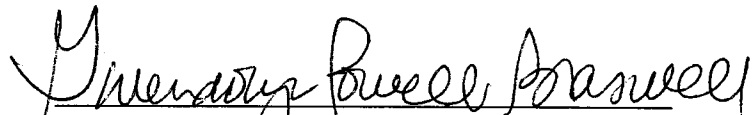
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was hand-delivered to the attorney for the Respondent: Natalia Costea, Esq., Assistant Attorney General, Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 650, Miami, Florida 33131, on this 21st day of January, 2010.


GWENDOLYN POWELL BRASWELL
Assistant Public Defender
Counsel for Petitioner

CERTIFICATE OF FONT

I HEREBY CERTIFY that the font used is 14 point Times New Roman.


GWENDOLYN POWELL BRASWELL
Assistant Public Defender
Counsel for Petitioner

IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

DCA NO. 3D09-3209

RODRIGO BONILLA,

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APPENDIX TO PETITIONER'S BRIEF ON JURISDICTION

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OPINION OF THE THIRD DISTRICT COURT OF APPEAL,
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Third District Court of Appeal

State of Florida, July Term, A.D. 2009

Opinion filed December 23, 2009.
Not final until disposition of timely filed motion for rehearing.

No. 3D09-3209
Lower Tribunal No. 04-31906

Rodrigo Bonilla,
Petitioner,

vs.

The State of Florida,
Respondent.

A Case of Original Jurisdiction – Habeas Corpus.

Rodrigo Bonilla, in proper person.

Bill McCollum, Attorney General, for respondent.

Before GERSTEN, SUAREZ, and SALTER, JJ.

PER CURIAM.

We deny the defendant's petition for writ of habeas corpus arguing ineffective assistance of appellate counsel. However, to preserve the defendant's

rights, we certify direct conflict with Montgomery v. State, 34 Fla. L. Weekly D360 (Fla. 1st DCA Feb. 12, 2009), which is currently pending review before the Florida Supreme Court. State v. Montgomery, 11 So. 3d 943 (Fla. 2009).

Habeas corpus denied; conflict certified.